IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, et al. Plaintiffs, v. TYSON FOODS, INC., et al. Defendants.	)	Case No. 4:05-cv-00329-GKF-SAJ

DEFENDANTS' MOTION TO DISMISS
COUNT 6 OF SECOND AMENDED COMPLAINT

I. INTRODUCTION

Pursuant to Federal Rule of Civil Procedure 12(b)(6), Defendants Tyson Foods, Inc., Tyson Chicken, Inc., Tyson Poultry, Inc., Cobb-Vantress, Inc., George's, Inc., George's Farms, Inc., Peterson Farms, Inc., Cargill, Inc., Cargill Turkey Production, LLC, Willow Brook Foods, Inc., Simmons Foods, Inc., Cal-Maine Farms, Inc. and Cal-Maine Foods, Inc. ("Defendants") move the Court for an order dismissing Count 6 of the Second Amended Complaint.

II. BACKGROUND

On June 15, 2007, the Court held that Plaintiffs lacked standing to pursue the common law trespass claim alleged in the First Amended Complaint and granted Plaintiffs leave "to replead Count 6 to specifically set forth those properties which they would have standing to assert a trespass claim upon." Tr. 6/15/07 Hrg., p. 176, lns. 11-18; *see also* 6/15/07 Minute Order (Dkt. No. 1358). Plaintiffs filed a Second Amended Complaint on July 16, 2007 ("SAC"). Plaintiffs' amended trespass claim still fails to satisfy Rule 12(b)(6) or the requirements of Oklahoma law and does not comply with the Court's direction.

III. ARGUMENT

Plaintiffs' amended trespass claim is more deficient than the one previously dismissed by this Court. In particular, Plaintiffs have failed to state a common law trespass claim because they have not alleged a legally sufficient possessory interest in any property. To the contrary, Plaintiffs' allegations show that the State does not have the requisite interest as a matter of law necessary to maintain a trespass claim. In addition, Plaintiffs have not identified any property that has been invaded, nor have they identified the particular defendant responsible for any invasion.

A. Rule 12(b)(6) Standard

A complaint which fails to allege facts sufficient to support a cause of action must be dismissed under Rule 12(b)(6). *See, e.g., Yanaki v. Iomed, Inc.*, 415 F.3d 1204, 1211 (10th Cir. 2005); *Boddie v. Schnieder*, 105 F.3d 857, 860 (2d. Cir. 1997). In ruling on a 12(b)(6) motion, a court may not assume that a plaintiff may come forward in the future with facts not alleged in the complaint. *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 526 (1983). The Supreme Court recently made clear in *Bell Atlantic Corp. v. Twombly*, ___ S. Ct. ___, 2007 WL 1461066 (May 21, 2007), that it is a plaintiff's burden to show that the facts alleged in the complaint are, if true, sufficient to state a claim under the law. *Id.* at *13. Specifically, Plaintiffs must "plead enough facts to state a claim that is plausible on its face" and in so doing "nudge their claims across the line from conceivable to plausible." *Id.* Defendants are no longer required to show "that a plaintiff can prove no set of facts in support of the claim that would entitle him to relief." *Id.* (abrogating *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

B. Plaintiffs Have Not Identified a Possessory Interest Sufficient to Support a Trespass Claim

In order to maintain a cause of action for trespass, a plaintiff must have a possessory interest such that plaintiff's consent or permission is required before another person may enter or use the property. *See, e.g.*, *Peterson v. City of Broken Arrow*, 1993 WL 345532, at *1 (10th Cir. 1993) (applying Oklahoma law); *Williamson v. Fowler Toyota, Inc.*, 956 P.2d 858, 862 (Okla. 1998); *Fairlawn Cemetery Assoc. v. First Presbyterian Church*, 496 P.2d 1185, 1187 (Okla. 1972). Stated differently, a plaintiff's rights in the property must include the right to exclude others from entering or using such property. Absent a right to exclude others, a party has no right to complain about the presence of another on property. *See* PROSSER AND KEETON ON THE LAW OF TORTS § 13, at 67 (5th ed. 1984) ("In the bundle of rights, privileges, powers, and immunities that are enjoyed by an owner of property, perhaps the most important is the right to exclusive 'use' of the realty.").

Public property is not exclusively possessed by any one person or entity. Because it is open to all, there is no right to exclude others. Thus, it is axiomatic that "public property" can not be the subject of a trespass claim.

Consistent with these principles, this Court dismissed the trespass claim because Plaintiffs failed to specify those properties in which they have the necessary possessory interest. The Court expressly required that Plaintiffs "specifically set forth those properties which they would have standing to assert a trespass claim upon" in the event they elected to replead this claim. Tr. 6/15/07 Hrg., p. 176, lns. 11-18; *see also* 6/15/07 Minute Order (Dkt. No. 1358).

The trespass claim asserted in the SAC rests entirely on conclusory statements about all water within the IRW. The specificity required by the Court is not provided. Plaintiffs do not identify the specific properties or waterbodies which they claim they "possess" for purposes of

their trespass claim. The Supreme Court has held that "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp.*, 2002 WL 1461066 at *12. Plaintiffs' amended trespass claim fails this test.

Plaintiffs claim "a possessory interest" in waters in the IRW (SAC, ¶¶ 119, 120, 123), but they do not identify the specific waters nor do they allege the right to exclude others from the waters which have allegedly been invaded. To the contrary, Plaintiffs' trespass claim is based solely on trespass to "public waters." Public waters are, of course, open to the public.

Blanket claims of dominion over "all water," like Plaintiffs' here, are inadequate to support a trespass action. This exact argument was advanced by the New Mexico Attorney General in *New Mexico v. General Electric*, 335 F. Supp. 2d 1185 (D. N.M. 2004), *aff'd* 467 F.3d 1223 (10th Cir. 2006). The Tenth Circuit rejected this argument. In *New Mexico*, the State of New Mexico asserted, *inter alia*, a claim for trespass to recover damages for allegedly contaminated groundwater. The New Mexico Attorney General claimed that the State's "proprietary interests in its natural resources" and "its role as public trustee . . . [made] it the proper party . . . in bringing a trespass action for actual damage to the public's water supply." *New Mexico,* 335 F. Supp. 2d at 1232 (quotations omitted). The district court held that neither New Mexico's "sovereign" interest in public waters nor its more general *parens patriae* status sufficient to confer on it standing to maintain a trespass claim. *Id.* at 1234-35 (New Mexico's claimed "broader sovereign and public trust/parens patriae interests in protecting the public's right to the use of all of the waters of New Mexico . . . fall outside of the scope of the law's protection traditionally afforded to private landowners' right of exclusive possession by the law of trespass.") Accordingly, the district court held that without "an exclusive possessory legal

interest pertinent to the groundwater in question . . . Plaintiffs cannot maintain a common-law cause of action for trespass." *Id.* at 1234. The Tenth Circuit affirmed. *New Mexico*, 467 F.3d at 1234.

The waters in the State of Oklahoma are no less "public" than the waters in the State of New Mexico. Just as New Mexico lacked the exclusive possession required to bring a common law trespass action, Oklahoma here lacks exclusive possession of waters in Oklahoma.

First, Oklahoma only holds its waters in public trust subject to the federal grant of those waters which establishes a right to public use. *See* 33 U.S.C. § 10 (the rivers and waters of the former Louisiana Purchase, which includes Oklahoma, "shall be and forever remain public highways."); *see also*, *Parm v. Shumate*, 2006 U.S. Dist. LEXIS 64080, at 3 (W.D. La. April 26, 2006) (finding that Louisiana Parrish Sheriff could not arrest those boating, fishing and hunting on the Mississippi River for trespass even where its high water mark inundated privately owned land.)

Second, Oklahoma law clearly defines the "public" nature of the waters over which Plaintiffs seek to pursue a trespass action. Under Oklahoma law, stream water "is subject to appropriation for the benefit and welfare of the people of the state as provided by law." 82 Okla. Stat. § 105.1A. However, the State does not have an exclusive possessory interest in those waters. To the contrary "[a]ny person has the right to take water for domestic use from a stream to which he is riparian or to take stream water for domestic use from wells on his premises." 82 Okla. Stat. § 105.2. All water unused by riparian owners or permit holders reverts to the public. *Id.* In fact, the Attorney General's office has acknowledged the fact that unappropriated waters are public waters open to public use. *See* Okla. Att'y Gen. Op. No. 78-170 (July 31, 1978) ("All rivers, streams, creeks and waterways within the State of Oklahoma forming a definite stream or

course are public waters, subject to appropriation by the State for the benefit and welfare of the people. Riparian owners along the waters forming a definite stream, navigable or non navigable may not fence across said waters for the purpose of limiting public use thereof; however, riparian owners may take reasonable action to prevent physical trespass upon their property by those persons seeking access to public waters.")

With respect to groundwater, Plaintiffs previously stated that their trespass claim was limited to groundwater beneath land actually owned by the State in the IRW. *See* Pltfs. Resp. to Motion for Judgment on the Pleadings, p. 11 (Dkt. No. 1111) ("The State also owns the groundwater where it owns the land above it. And, of course, the State owns specific parcels of land."); *see also*, Tr. 6/15/07 Hrg., p. 165, lns. 18-20 (describing State's interest in "groundwater beneath those areas where we own the surface estate.") Such a limitation on groundwater trespass claims is consistent with Oklahoma law. 60 Okla. Stat. § 60 ("The owner of the land owns water standing thereon, or flowing over or under its surface . . . ."); *see also Messer-Bowers Co. v. Oklahoma*, 8 P.3d 877, 879 (Okla. 2000). However, the SAC fails to identify a single "surface estate" owned by Plaintiffs beneath which they allege the groundwater has been physically invaded or contaminated. To the extent Plaintiffs' general references to streams "under the surface" is intended to state a trespass claim for groundwater, such claims must be dismissed because Plaintiffs have failed to allege that such groundwater is beneath specific property owned by Plaintiffs.

Like the New Mexico Attorney General in *New Mexico,* Plaintiffs here nakedly assert their *parens patriae* status affords them, "without limitation, . . . an interest in . . . all waters in the IRW running in definite streams." SAC, ¶ 5. As a matter of law, this is not sufficient to support a trespass claim. "Absent the pleading of an exclusive possessory legal interest

pertaining to the [waters] in question . . . Plaintiffs cannot maintain a common-law cause of action for trespass against those who have allegedly contaminated the public's waters." *New Mexico*, 335 F. Supp. 2d at 1234. Accordingly, Oklahoma's claim for trespass to the IRW's natural resources must be dismissed in its entirety.

C. The Complaint Fails to Identify Any Specific Property Where a Physical Invasion Has Occurred

Plaintiffs also have not plead any facts regarding the physical invasion of any of these unidentified waterbodies. Plaintiffs do not identify the specific defendants they claim are responsible for physically invading these unidentified waterbodies. Instead, Plaintiffs' trespass claim rests entirely on the generic *ipse dixit* statement that there has been a physical invasion of "the State of Oklahoma's possessory property interest in the water in that portion of the Illinois River Watershed located within the territorial boundaries of the State of Oklahoma which runs in definite streams, formed by nature, over or under the surface." SAC, ¶ 119. This clearly fails the test under Rule 12 and the specific requirements of the Court's June 15, 2007, Order.

The Illinois River Watershed ("IRW") encompasses more than 1,069,530 acres. SAC, ¶ 21. More than one-half of the IRW, or 576,030 acres, lies in Oklahoma. *Id.* Included in that 576,030 acres are millions of cubic feet of water in the 12,900 acre Lake Tenkiller, sprawling underground aquifers, and hundreds of different streams, creeks and rivers winding over hundreds of miles of streambed. *Id.*, ¶¶ 22-25 and Exhibit 1. There are literally hundreds of waterbodies in the IRW in the form of underground aquifers, lakes, rivers, tributaries, streams and creeks. The SAC does not specify which waterbodies the State claims to "possess," nor does it identify which of the waterbodies allegedly are contaminated.

Plaintiffs' failure to allege elements necessary to assert (and maintain) a trespass claim is especially inexcusable given the stage of this litigation. Plaintiffs filed this lawsuit more than

two years ago. They have incessantly boasted about their purported comprehensive "sampling program" and "investigation" of the IRW. *See* Tr. 5/17/06 Hrg. p. 16 (Plaintiffs' counsel represented that their experts have conducted "copious testing of the surface waters through the Illinois basin . . . [by setting] yellow barrels out there taking high flow and base flow samples."); Pls. Mot. for Leave to Conduct Expedited Discovery (Dkt. No. 210), pp. 4, 9, 10 (discussing Plaintiffs' extensive "investigation" of contamination and "waste disposal practices" in the IRW). The law requires Plaintiffs to plead the facts supporting their trespass claim, including the properties they possess and the properties which have been invaded by each defendant. Plaintiffs should not be permitted any longer to conceal the emptiness of their rhetoric behind vague and generic allegations.

Plaintiffs' trespass claim violates the requirements of Rule 12 and defies this Court's explicit instructions. Accordingly, the trespass claim asserted in the SAC should be dismissed.

IV. CONCLUSION

The allegations of the Second Amended Complaint, even if taken as true, do not support a common law trespass claim because Plaintiffs have not alleged a possessory interest sufficient to support a trespass cause of action. Further, Plaintiffs have not identified any property that has been invaded. Accordingly, Plaintiffs' trespass claim (Count 6) must be dismissed.

Respectfully submitted,

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